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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 513.

COOPERSTOWN CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF.

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REPLY BRIEF.

Summary of Argument of Reply Brief.

Respondent's brief in opposition does not deny the grounds for the granting of the writ advanced in the application.

Respondent incorrectly states the question presented by this case.

A tax paid pursuant to an erroneous assessment is deductible under Section 23 of the Revenue Act of 1936 even though it was not paid under protest or duress.

Certain of the factual statements in respondent's brief are unsupported by the record.

Finally, even if the question presented by this case were, as stated by respondent, whether taxes actually but

erroneously paid, without protest and not under duress, are deductible, that question is itself of such major importance that this Court should issue the writ of certiorari for its determination.

(1)

Respondent's brief does not deny the grounds for the granting of the writ advanced in the application.

Respondent's brief in opposition to the granting of the writ does not deny (1) that the decision below places a novel qualification upon the effect of the decision of this Court in *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281; (2) that it is directly inconsistent with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Nash* v. *Commissioner,* 88 F. (2d) 477, certiorari denied, 301 U. S. 700; or (3) that it is in direct conflict with the decision of the Tax Court rendered June 23, 1944 in *Stanard-Tilton Milling Co.* v. *Commissioner,* 3 T. C.—No. 127.

It is true that by incorrectly stating the question involved in this case, the Government seeks to avoid a patent conflict with the doctrine of the *Security Flour Mills Co.* case; but the conflict with the above-cited decisions of the Circuit Court of Appeals for the Seventh Circuit and of the Tax Court still remains, because those decisions, reaching results contrary to that of the Court below, were made in factual situations precisely the same as those present in the instant case.

(2)

Respondent incorrectly states the question presented by this case.

Respondent incorrectly states the question presented in this case as whether, where a corporation voluntarily "pays a tax for which it is not liable", the amount may be deducted

as "Taxes paid" under Section 23 (c) of the Revenue Act of 1936, 49 Stat. 1658, 1659.

The question really is whether where a corporation *pays a tax erroneously assessed against it* (R. 3a, 11a, 14a), but refunded two years later (R. 14a), the amount of the tax *so assessed and paid* may be deducted as "Taxes paid" under the applicable Revenue Act.

The question as now stated by the Government was not raised by the pleadings (R. 3a, 11a) or by the Stipulation of Facts (R. 13a, 14a), was not considered or decided in the opinion of the Board of Tax Appeals (R. 16a-19a), was not presented by the petition for review to the Circuit Court of Appeals (R. 22a), and is not presented by the statement of facts appearing in its original opinion.

(3)

A tax paid pursuant to an erroneous assessment is deductible even though it was not paid under protest or duress.

Respondent appears to place the burden of his argument upon the fact that the capital stock taxes were paid "voluntarily", which means, we presume, without protest or duress. This is a false issue for two reasons: (1) because the statute provides that "Taxes paid" shall be deductible without qualification—not only taxes paid under protest or duress; and (2) because Congress, after having eliminated the common law requirement of protest or duress with respect to the payment of taxes in many specific cases (see *United States* v. *Hvoslef*, 237 U. S. 1; *Greenport Basin & Construction Co.* v. *United States*, 269 Fed. 58), finally abolished as to *all* internal revenue taxes the common law rule expressed in *Chesebrough* v. *United States*, 192 U. S. 253, by Section 1014 (a) of the Revenue Act of 1924, 48 Stat. L. p. 343, which inserted in Section 3226 of the Revised

Statutes, referring to suits for refund of taxes, the following provision:

> "but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

This amendment, now carried into Section 3772 (b) of the Internal Revenue Code, has been held by this Court to be applicable even to suits against Collectors of Internal Revenue (*George Moore Ice Cream Co., Inc.* v. *Rose,* 289 U. S. 373).

Obviously, therefore, when Congress authorized the deduction of "Taxes paid", it authorized the deduction of all taxes paid, whether or not erroneously assessed, and whether or not paid under protest or duress.

(4)

Certain of the factual statements in respondent's brief are unsupported by the record.

The claim for refund of capital stock taxes was by no means "promptly" allowed as asserted at page 4 of respondent's brief; over eighteen months elapsed before its allowance (R., 14a). Nor is it the fact that "it is here agreed that the taxpayer was not liable for the capital stock tax" (Resp., Br. p. 4); the question was not even in issue below and there is no evidence or finding on the subject. Nor is there evidence in the record to sustain respondent's assertion (Resp., Br. p. 4) that "there never was any disagreement on that point"; the delay of eighteen months in allowing the claim for refund argues strongly to the contrary.

(5)

Even if the question in this case were as stated by the Government, it is of such general importance that the application for a writ of certiorari should be granted.

The Government asserts that taxes paid under a mistake of fact or of law are not deductible as "Taxes paid" under Section 23 (c) of the Revenue Act of 1936 unless paid under protest or duress.

If that assertion were true, it would be equally applicable to the identical provisions in other Revenue Acts and to Section 23 (c) of the Internal Revenue Code as it stands today.

Practically every tax payable by a corporation, or even by an individual, other than real estate taxes, is paid, like the capital stock tax, pursuant to a report or return, the *making* of which is *compulsory,* upon which the amount of the tax is computed by the taxpayer. Under the contention here made by the Government, every payment of tax made by every taxpayer pursuant to a tax return would be classed as "voluntary", and non-deductible as a "Tax paid", if erroneously computed, although actually paid as and for a tax.

This contention is made in the teeth of the fact that an amount so paid clearly comes within the definition of "any internal revenue *tax* alleged to have been erroneously or illegally assessed or collected" in Section 3772(a) of the Internal Revenue Code, which provides for the maintenance of suits or proceedings to recover the same; and also comes within the definition of "an overpayment of any *tax*" as used in Section 322 of the Internal Revenue Code relating to refunds.

The Government points to no administrative ruling, to no Regulation and to no decided case as supporting its contention.

The Government in effect implies that there shall be inserted in the statute by judicial construction, after the words "Taxes paid", something like the following: "(to the extent ultimately held to be correctly assessed, or if paid under protest or duress)".

The widespread effect of such an interpretation of the statute, never heretofore adopted, and directly contrary to the decisions of the Circuit Court of Appeals for the Seventh Circuit and of the Tax Court cited on page 2, *supra*, is beyond debate. If that be, in truth, the single question involved in this case, then it is respectfully submitted that this Court should issue its writ of certiorari in order that there may be a final determination of that question.

Respectfully submitted,

ALEXANDER B. SIEGEL,
Counsel for Petitioner.